Filed 5/22/15 In re J.M. CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re J.M. et al., Persons Coming Under the Juvenile Court Law.	
ALAMEDA COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. F.M., Defendant and Appellant.	A142654 (Alameda County Super. Ct. Nos. SJ14022588 & SJ14022589)

Defendant F.M., the father of two minor sisters who are dependents of the juvenile court, appeals from the dispositional order denying him family reunification services.[1] He contends the reunification bypass provisions of Welfare and Institutions Code[2] section 361.5, subdivision (e)(1), violate his constitutional right to equal protection because they unjustifiably treat pretrial defendants who are incarcerated differently from defendants charged with crimes who are not in custody. We disagree with his contentions and affirm.

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[1] The two sisters share the same initials. For purposes of protective nondisclosure, we will refer to the older sister as J.M.1 and the younger sister as J.M.2.

[2] All further statutory references are to the Welfare and Institutions Code except as otherwise indicated.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On the afternoon of March 14, 2014, 14-year-old J.M.1 entered the family residence and went upstairs to where all the bedrooms were located. She came to her parents' bedroom and saw a leg hanging out of the closet. Believing it to be fake, she walked into the closet and turned on the light. Upon seeing a body on the floor with blood on its stomach, she immediately ran out of the home and called 911. She was later transported to the Alameda County Sheriff's Office. Her eight-year-old sister J.M.2, who had been at a friend's home, was brought to the sheriff's office two hours later. Both siblings reported a past history of domestic violence between their parents. The older sister was informed that her father was missing and the body in the closet might be her mother's.

On March 17, 2014, defendant was arrested and charged with felony murder of the girls' mother, Y.Z. (Pen. Code, § 187.)

On March 18, 2014, the Alameda County Social Services Agency (Agency) filed a section 300 petition on behalf J.M.1 and J.M.2. The petition alleged that the girls came within section 300, subdivision (g), in that defendant had been arrested on suspicion of murdering their mother and was currently in custody and unable to provide care or support for the children.

On March 19, 2014, the girls were ordered detained. The Agency placed them in a foster home.

On April 16, 2014, the Agency filed a disposition report recommending that the juvenile court apply the bypass provision of section 361.5, subdivision (e) to deny defendant reunification services. The Agency also recommended the girls be placed in a permanently planned living arrangement with the eventual goal of legal guardianship with relatives.

On May 2, 2014, after a contested jurisdiction hearing, defendant submitted to the petition's allegations. The juvenile court found the allegations to be true and set the matter for a contested disposition hearing.

On May 22, 2014, defendant filed a brief asserting section 361, subdivision (e)(1), violates the equal protection clause of the Fourteenth Amendment to the United States Constitution when applied to parents who are detained pending a criminal trial. He reasoned that the statute permits pretrial detainees to be denied reunification services due to their custodial status, while defendants who can afford to post bail are presumptively entitled to reunifications services. He further argued that a distinction based solely on the custodial status of a parent is irrelevant to any legitimate governmental objective.

That same day, the Agency filed a brief in support of using section 361.5, subdivision (e)(1), as a basis for bypassing defendant for reunification services. The Agency primarily relied on *Edgar O. v. Superior Court* (2000) 84 Cal.App.4th 13 (*Edgar O.*), a case factually similar to the present one, in which reunification services were denied to a father who had murdered the mother of his children.

On May 28, 2014, the Agency filed an addendum report. The report continued to recommend defendant not be offered reunification services. The Agency believed offering reunification services "would be detrimental to both minors" because J.M.1 had "consistently stated that she does not want contact with her father and . . . she does not want to return to his care," as she "believes that her father is responsible for the mother's death." She had also specifically stated that she did not wish to reunify with defendant. While J.M.2. tended to avoid the topic of her father during therapy sessions, she did not have full knowledge of how her mother died and her father's possible involvement. Her therapist wanted to gradually bring certain details to her as deemed therapeutically appropriate. Both girls continued to have emotional struggles due to the loss of their mother.

On May 28, 2014, the contested disposition hearing was held. Without specifically addressing defendant's equal protection argument, the juvenile court ruled the provision of reunification services would be detrimental to the two girls and denied services to defendant. The court denied defendant visitation, finding visitation would also be detrimental to the girls. The matter was continued to June 5, 2014, at which point the court adopted the Agency's dispositional recommendations. This appeal followed.

DISCUSSION

I. Reunification Services and Incarcerated Parents

Generally, when the juvenile court removes a child from parental custody, it must provide the parent reunification services. (§ 361.5, subd. (a).) The goal of reunification services is to eliminate the conditions leading to loss of custody and to facilitate reunification of parent and child. The provision of such services furthers the legislative goal of preserving the family whenever possible. (*In re Allison J.* (2010) 190 Cal.App.4th 1106, 1112.)

Notwithstanding the general mandate to provide reunification services, the Legislature has determined that attempts to facilitate reunification in certain situations do not serve and protect the minor's interests. (*In re Joshua M.* (1998) 66 Cal.App.4th 458, 467 (*Joshua M.*).) As such, it has enacted certain exceptions where the juvenile court may deny a parent reunification services. One such exception is made for cases in which a parent is presently incarcerated.

The standard for determining whether reunification services should be afforded incarcerated parents is provided in section 361.5, subdivision (e)(1).[3] In pertinent part, the subdivision states: "If the parent or guardian is incarcerated . . ., the court shall order reasonable services *unless* the court determines, by clear and convincing evidence, those services would be *detrimental to the child*. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, . . . the nature of the crime . . ., the degree of detriment to the child if services are not offered and, for children 10 years of age or older, the child's attitude toward the implementation of family reunification services . . ., and any other appropriate factors." (Italics added.)

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[3] When offered, services for an incarcerated parent may include, but are not restricted to, maintaining contact with the child through collect telephone calls, visitation, and transportation services, as well as services for extended family members or foster parents who are providing care for the child. (§ 361.5, subd. (e)(1)(A)–(D).) The service plan may also include counseling and parenting classes, if those services are available. (§ 361.5, subd. (e)(1)(D).)

In prescribing these "detriment" factors for the juvenile court's consideration, section 361.5, subdivision (e)(1) "does not require that each listed factor exist in any particular case, nor does it specify how much weight is to be given to a factor bearing on detriment, listed or not." (*Edgar O., supra,* 84 Cal.App.4th at pp. 18–19 [where the juvenile court "accorded significant weight to three of the factors listed in section 361.5, subdivision (e)(1), 'nature of the crime,' 'age of the children,' and 'degree of parent-child bonding' in determining that family reunification services to petitioner would be detrimental to the children."].)

II. The Bypass Provision For Incarcerated Parents Does Not Violate Their Equal Protection Rights

Defendant asserts section 361.5, subdivision (e)(1), violates the equal protection clause of the Fourteenth Amendment of the United States Constitution, and article I, section 7 of the California Constitution, because it permits parents subject to pretrial incarceration to be denied reunification services, whereas parents who are not incarcerated pending trial cannot be denied reunification services under the same criteria.[4] We disagree with defendant's assertion. In doing so, we exercise our independent review regarding constitutional challenges and issues of law (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 632), and we uphold factual findings if they are supported by substantial evidence. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1032.)

Under the equal protection clause, the Legislature may not enact statutes that "draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective." (*Lehr v. Robertson* (1983) 463 U.S. 248, 265.) "[I]t

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[4] "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike. [Citation.]" (*Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 439.) " 'The equal protection guarantees of the Fourteenth Amendment and the California Constitution are substantially equivalent and analyzed in a similar fashion. [Citations.]' " (*People v. Lynch* (2012) 209 Cal.App.4th 353, 358.)

may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state purpose." (*Id*. at p. 266.)

In determining whether disparate treatment exists, courts have held that persons are entitled to equal protection under the Fourteenth Amendment only when they are "similarly situated" to a class of persons that are treated differently under the law. (*People v. Carrillo* (1984) 162 Cal.App.3d 585, 593.) " ' "The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." ' " (*In re Eric J.* (1979) 25 Cal.3d 522, 531.) Equal protection rights are implicated where the state has adopted "a classification that affects two or more *similarly situated* groups in an unequal manner." (*Id.* at p. 530, italics in original; *Joshua M., supra*, 66 Cal.App.4th at p. 473.)

We first disagree with defendant's premise that parents who are incarcerated before trial are similarly situated to parents that have been charged with a crime but are not in custody. In *Edgar O.*, the appellate court observed: "Parents who are incarcerated or institutionalized are *confined,* and in our view the obvious purpose of section 361.5, subdivision (e)(1), which applies to a parent who is 'incarcerated or institutionalized,' is to address reunification services *in cases where parents are not at liberty to come and go* or to schedule activities as they please." (*Edgar O., supra,* 84 Cal.App.4th at p. 18, italics added.) Thus, the rationale for singling out parents who are incarcerated does not center on the fact that they are facing criminal charges.[5] Rather, the statute is directed at the physical circumstances of the parent whose freedom of movement is undeniably restricted. Accordingly, we conclude that, for purposes of this statute, persons who are charged with criminal offenses and who are incarcerated are not similarly situated to persons who are also charged with offenses but who are not incarcerated.

[5] We note section 361.5, subdivision (e)(1), also applies to parents who have not been charged with a crime at all, such as parents who are institutionalized or who have been deported.

Even assuming the two classes of criminal defendants awaiting trial—those who are in custody as opposed to those who are out on bail—are similarly situated, the equal protection clause merely requires some rationality in the nature of the class singled out and requires the distinctions drawn have some relevance to the purpose for which the classification is made. (*In re Christina A.* (1989) 213 Cal.App.3d 1073, 1079 (*Christina A.*).) Appellant concedes that the appropriate standard of scrutiny here is whether there is a rational basis for the statutory distinction. " 'Wide discretion is vested in the Legislature as to the making of a classification, and every presumption is in favor of its validity; the decision of the Legislature as to what constitutes a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous.' " (*In re Erika W.* (1994) 28 Cal.App.4th 470, 478.)

The purpose of the reunification bypass provisions generally is to exempt from reunification services those parents who are unlikely to benefit. This purpose ensures the well-being of children whose parents are unable or incapable of caring for them by affording them another stable and permanent home within a definite time period. (*Christina A., supra,* 213 Cal.App.3d at p. 1079–1080.) "It is reasonable for the state, before expending its limited resources for reunification services, to distinguish between those who would benefit from such services and those who would not." (*Christina A.* at p. 1080; *Joshua M., supra,* 66 Cal.App.4th at p. 474.) The option to deny reunification services to incarcerated parents under section 361.5, subdivision (e)(1), furthers this reasonable purpose.

As we have already discussed, ". . . the purpose of reunification services is to facilitate the return of a dependent child to *parental* custody." (*In re Jodi B.* (1991) 227 Cal.App.3d 1322, 1326; cf. *In re Marilyn H.* (1993) 5 Cal.4th 295, 307–308.) Manifestly, a parent who is incarcerated cannot assume custody of a child. While it is true that a parent who is awaiting trial while out on bond may ultimately be convicted and incarcerated for a substantial period of time, it is not arbitrary or irrational for the Legislature to offer such parents reunification services while they remain out of custody.

Accordingly, we hold section 361.5, subdivision (e)(1), does not run afoul of constitutional principles of equal protection.

Significantly, defendant does not contend there was not substantial evidence of detriment to his daughters. He also has not cited any legal authority for the proposition that he has a constitutional right to family reunification services based on the record here. (Cf. *Joshua M., supra,* 66 Cal.App.4th at p. 476 [rejecting argument that denial of family reunification services under section 361.5, subdivision (b), violates due process and reasoning under equal protection analysis that "[r]eunification services are a benefit, and there is no constitutional 'entitlement' to these services"].)

Here, the juvenile court expressly found that providing defendant reunification services would be detrimental to his children. On appellate review of a juvenile court's factual determinations and exercise of discretion in a dependency matter, we must uphold the judgment if it is supported by substantial evidence. (*In re Jasmine C.* (1999) 70 Cal.App.4th 71, 75.) The facts as we have summarized above amply support the court's conclusions. Accordingly, in addition to finding no constitutional violation, we conclude substantial evidence supports a finding that the provision of reunification services to defendant would be detrimental to his children.

DISPOSITION

The order is affirmed.

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DONDERO, J.

We concur:

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MARGULIES, Acting P.J.

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BANKE, J.